

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

ERICKSON PRODUCTIONS, INC., and
JIM ERICKSON,

Plaintiffs,

v.

ATHERTON TRUST; and ONLY
WEBSITES, INC.

Defendants.

No. 12-cv-1693 (PGG) (KNF)

Hon. Paul G. Gardephe
Hon. Kevin Nathaniel Fox

**ECF CASE
Electronically Filed**

**PLAINTIFFS' STATEMENT OF
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the Order entered by the Court on October 22, 2013 (Docket No. 35), Plaintiffs Erickson Productions, Inc. ("Erickson Productions") and Jim Erickson ("Erickson") (collectively "Plaintiffs"), by and through undersigned counsel, hereby submit this Statement of Proposed Findings of Fact and Conclusions of Law in support of their application for an award of joint and several statutory damages, pursuant to 17 U.S.C. § 504(c)(2), against Defendants Atherton Trust ("Atherton") and Only Websites, Inc. ("Only Websites") (collectively, "Defendants").

PROPOSED FINDINGS OF FACT

1. Plaintiff Jim Erickson created and owns all copyrights in the photos at issue in this action, which are identified as (i) Image ID 15079 / Film No. 07004-278; (ii) Image ID 3540 / Film No. 01018-03; and (iii) Image ID 21002 / Film No. 07006-3520. *See* Hughes Decl. ¶¶ 6-14, Exs. A-C.

2. Defendants copied and then published these three photos on a website owned by Kraig Kast (“Kast”) and Atherton Trust without permission. *See* McCulloch Decl. Ex. A; Hughes Decl. ¶¶ 15-17.

3. Erickson’s copyrights in the photo identified as Image ID 15079 / Film No. 07004-278 are registered under Copyright Registration VA 1-745-747. *See* Hughes Decl. ¶ 7, Ex. A.

4. Erickson’s copyrights in the photo identified as Image ID 3540 / Film No. 01018-03 are registered under Copyright Registration VA 1-734-754. *See* Hughes Decl. ¶ 10, Ex. B.

5. Erickson’s copyrights in the photo identified as Image ID 21002 / Film No. 07006-3520 are registered under Copyright Registration VA 1-632-501. *See* Hughes Decl. ¶ 13, Ex. C.

6. Erickson Productions is the sole U.S. distributor and licensor of photographic images taken by Plaintiff Jim Erickson. *See* Hughes Decl. ¶ 3.

7. The three photographs at issue in this action were among several photos licensed by Erickson Productions to Wells Fargo Wealth Management Marketing (“Wells Fargo”) for limited use on the Wells Fargo website. *See* Hughes Decl. ¶ 15, Ex. D.

8. The rights granted to Wells Fargo were set forth in a license agreement (Invoice No. 3435) dated August 25, 2010. *See* Hughes Decl. Ex. D.

9. Although Erickson charged its customer Wells Fargo a discounted licensing rate of \$700 to use each of the photos at issue in this action, *see* Hughes Decl. Ex. D, Erickson's typical licensing rate for online usage rights is approximately \$1,250 per photo (\$3,750 total). *See* Hughes Decl. ¶¶ 18-19.

10. The infringing website was created, at the behest of Kast, by Defendant Only Websites. *See* McCulloch Decl. Ex. D.

11. Only Websites is a company that specializes in creating websites for its customers and thus knew, or should have known, that using photos copied from a third-party website without permission was a violation of copyright laws. *See* McCulloch Decl. Ex. D.

12. Kast copied Erickson's photos from Wells Fargo's website without permission. *See* Hughes Decl. ¶¶ 16-17.

13. Kast provided copies of Erickson's photos to Only Websites for the express purpose that the photos be included on the Atherton website. *See* McCulloch Decl. Ex. D.

14. At Kast's direction, Only Websites included the three Erickson photos in the Atherton website despite knowing that the unlicensed use of images copied from a third-party website violated relevant copyright laws. *See* McCulloch Decl. Ex. D.

15. Kast and Atherton were aware that Erickson's photos had been included in the Atherton website created by Only Websites and approved the publication of the photos. *See* McCulloch Decl. Ex. D.

16. Erickson Productions never granted a license to use any Erickson photos to Kraig Kast, Atherton Trust, or Only Websites. *See* Hughes Decl. ¶¶ 16-17.

17. Through counsel, Erickson Productions sent a cease and desist demand to Kast and Atherton prior to suit. *See* McCulloch Decl. Ex. A.

18. Despite knowing that Atherton would be a defendant in a copyright action and contrary to his duties as managing trustee, Kast “dissolved” Atherton Trust and shifted the financial holdings of Atherton to a newly-created company in a transparent attempt to improperly hide assets from any judgment against him or Atherton. *See* McCulloch Decl. Exs C & C.

19. Atherton and Only Websites failed to appear in this action and, therefore, the Court entered an order of default judgment against both defendants. *See* Docket No. 18 (entered Nov. 28, 2012).

PROPOSED CONCLUSIONS OF LAW

21. Defendants violated Erickson's copyrights by copying and publishing these three photos without permission or a license.

22. Defendants are liable for three instances of copyright infringement. Each instance of copyright infringement relates to a photo registered with the Copyright Office under a separate certificate of registration, each of which has an effective date of registration prior to the Defendants' infringements. Plaintiffs thus are entitled to three separate damages awards under 17 U.S.C. § 504.

23. Plaintiffs have elected to recover statutory damages under 17 U.S.C. § 504(c) in all three instances.

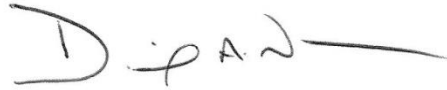
24. Due to the Defendants' knowing violations of copyright law and their transparent efforts to avoid liability, as well as other factors identified in Plaintiffs' submissions, the Court Defendants' infringements are "willful" and thus Plaintiffs are entitled to heightened statutory damages under 17 U.S.C. § 504(c)(2) for each of the three infringements.

25. As the prevailing party, Plaintiffs also are entitled to recover their litigation costs and attorneys' fees under 17 U.S.C. § 505.

26. Defendants' liability for the damages and fee award is joint and several.

Dated: New York, New York
November 12, 2013

NELSON & McCULLOCH LLP

A handwritten signature in dark ink, appearing to read "Danial A. Nelson", with a long horizontal stroke extending to the right.

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